

No. 11450

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellant,

vs.

EUGENE DASHIEL, doing business as Aluminum
Fabricators,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

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Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

In the District Court of the United States
for the District of Oregon

No. Civ. 2994

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

EUGENE DASHIEL, d/b/a ALUMINUM
FABRICATORS, Lake Grove, Oregon,

Defendant.

OPINION

Prior to the events chronicled here, Dashiell, the defendant, was employed by Inca Metals Products Corp. as sales manager. The firm manufactured aluminum griddles and had sold some before 1942 for use in CCC camps for \$7.50 each. Organizing the Aluminum Fabricators in March, 1945, Dashiell bought the griddle part of Inca's business and claims the right as transferee to charge Inca's pre-war price. However, due to increased production and sales, the present price is \$2.25 at the factory at Lake Grove, near Portland, Oregon, freight prepaid.

The Oregon District office of OPA appears to have doubted the validity of Dashiell's claim to transferee rights, and insisted, so Dashiell testified, on threat of dire measures, including prosecution, that he file for a price under the "Fourth Pricing

Method", which is the method for pricing articles that were not in use in March, 1942, or at an earlier date. This Dashiell did on July 24, 1945, without waiving his claim to transferee rights. The application was filed in the Portland, Oregon, district office of OPA, and all prior negotiations, oral as well as written, were with the district office. Dashiell's Fourth Method application was forwarded to the Price Administrator in Washington, but the prior correspondence with the district office was not forwarded, nor was any statement sent to Washington which showed that Dashiell claimed transferee rights.

Pursuant to the application, the Administrator made an order September 11, 1945, fixing the price of \$2.00 per griddle with certain variances, freight prepaid. The order, which was made retroactive, contained no reference to Dashiell's claim of transferee rights; nor, as stated, did Administrator Bowles, who signed the order, know that such claim had been made to the district office.

This action is for forty thousand dollars approximately, three times the amount of alleged overcharges (the difference between \$2.25 and \$2.00 per griddle), on sales made during the year preceding the date of filing the complaint, November 29, 1945. An injunction is also asked.

Early History of the Case

Counsel had agreed before Judge Fee on the form of a pre-trial order to the effect that the sole

question for determination was whether Dashiel had transferee rights. The day of the trial, which fell to me because of Judge Fee's absence on account of an up-State term. OPA resident counsel, a sound and trusted lawyer, asked to be relieved of the stipulation on the ground that other OPA counsel insisted that a trial as to the validity of defendant's claim to transferee rights would amount to questioning the validity of the order of September 11, 1945, contrary to Sec. 204 (d) of the Price Control Act.

I granted local counsel's request to be relieved from the stipulation, and it developed at the trial that other counsel (who was permitted to appear specially) took the position that, in making the order of September 11, the Administrator had considered and rejected defendant's claim to transferee rights.

Counsel for the defendant, on the other hand, contended that defendant was not questioning the validity of the Administrator's order. He questioned only its applicability, he said. His client, he contended, had always claimed transferee rights and had not waived the claim by applying, under duress, for a price under the Fourth Pricing Method, which applied only to new articles manufactured for the first time since 1942.

The Trial

At the trial plaintiff introduced the order of September 11, and proved by defendant that he

had made sales during the period covered by the complaint above the ceiling fixed by the order. Defendant in his own behalf testified, over objection, to the circumstances under which he acquired Inca's griddle business, claiming thereby to have acquired the right under the regulations to Inca's 1942 ceiling price.

Consistent with his revised theory of the case, plaintiff offered no testimony to dispute defendant's claim that he had acquired transferee rights and continued to insist that, whether or not the defendant was entitled to transferee rights, could not be inquired into, in view of the order of September 11, 1945.

My View

It seems plain to me that Administrator Bowles cannot be said to have passed on something, which not only was not presented to him, but about which he knew nothing. The most that has been held, in deference to the oft-repeated claim that "intolerable procedural burdens" should not be imposed on the Price Administrator, is that the Administrator need not give oral hearings, though requested, but it has not, so far as I know, ever before been urged that the Administrator could wipe out a claim on which the existence of a business depends, without at least having before him and considering the documents presented in support of the claim; and I would not expect Administrator Bowles to maintain that such had been his intention in making the order. If there were any doubt about this, I would

insist on having the Administrator's deposition taken.

Origin of This Case

I cannot leave this case without comment on its origin. It is one of a series of obviously punitive actions for which a (one time) influential source in the district OPA office is responsible, as the papers on file with us show. We have had in the court a number of cases of that origin. Nearly always the defendants were people of moderate, sometimes of small means. In all of these cases the full penalty permissible under the statute was demanded. When reasonable settlements were offered, they were rejected arrogantly. In one case a widow woman, having the added burden of a paralytic brother, was pursued relentlessly. Not only was no sympathy with the problems of the defendants ever shown, the methods employed in prosecuting the cases evinced a total lack of understanding of the principles of American justice. The cases, and others, constitute a discreditable chapter in law enforcement. They weaken the respect of the citizen for all law enforcement. They undermine the citizen's faith in his Government.

For the reasons earlier stated, judgment in this case will be for the defendant.

Dated this 6th day of May, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 6, 1946.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Opinion, in Civil 2994, Chester Bowles, Adm. OPA vs. Eugene Dashiell, d/b/a Aluminum Fabricators, Lake Grove, Oregon, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 19th day of February, 1947.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy Clerk.

[Endorsed]: No. 11450. United States Circuit Court of Appeals for the Ninth Circuit. Philip B. Fleming, Temporary Controls Administrator, Appellant, vs. Eugene Dashiell, doing business as Aluminum Fabricators, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed February 21, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

